

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON

FILED

MAR 31 2005

TERESA L. JEFFERSON, CLERK
U.S. DISTRICT COURT
Southern District of West Virginia

UNITED STATES OF AMERICA,
Respondent,

v.

Civil Action No. 3:04-1001
(Criminal No. 3:02-00231)

JOHN DAVID MOONEY,
Movant.

**UNITED STATES RESPONSE TO MOVANT JOHN DAVID MOONEY'S
MOTION TO VACATE SENTENCE PURSUANT TO 28 U.S.C. § 2255**

Comes now the United States of America, by counsel, Michael L. Keller, Assistant United States Attorney for the Southern District of West Virginia and opposes the Motion to Vacate Sentence filed on behalf of John David Mooney. For the reasons herein provided, the United States respectfully submits that movant has failed to demonstrate that his otherwise voluntary guilty plea was obtained as a result of ineffective assistance of counsel.

BACKGROUND

Movant John David Mooney (hereinafter "defendant") is a multiple convicted felon. In 1982, he was convicted of burglary, in 1993, he was convicted of non-aggravated robbery, and in 1989, he was convicted of aggravated robbery. These felony convictions made defendant a prohibited person pursuant to 18 U.S.C. § 922(g)(1) and, therefore, legally barred from possessing a firearm.

On August 4, 2002, at approximately 2:00 a.m., defendant entered the home of his ex-wife. Although defendant has contended

that he was residing at that home with his ex-wife's permission, in statements to the police, she denied that assertion and contended that defendant had entered the residence without her authorization. In any event, once in the home that night, defendant engaged in a physical confrontation with his ex-wife. At some point during the altercation, defendant took possession of a firearm belonging to his ex-wife.

Defendant subsequently left the house with the firearm still in his possession. He walked to a local bar where he was occasionally employed.

Acting in response to a 911 call from defendant's ex-wife, the police also went to the bar in search of defendant. They located defendant who was, at that time, still in possession of the pistol that he had taken from his ex-wife's home.

On October 8, 2002, defendant was indicted by a federal grand jury sitting in Huntington, West Virginia. The indictment brought charged him with a violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) (felon in possession of a firearm).

On February 16, 2003, defendant appeared before United States District Judge Robert C. Chambers for the purpose of entering his guilty plea. See, Plea Transcript, attached hereto as Exhibit A. During that plea hearing, the district court advised defendant that if he qualified as an armed career criminal, he would face a mandatory minimum of a fifteen year prison sentence and a maximum

term of life imprisonment. Defendant acknowledged that he understood both the potential minimum and maximum penalties. Also during the plea hearing, defendant testified regarding the factual basis supporting his plea. He admitted that he had, in fact, possessed the firearm on August 4, 2002. The district court then called upon the United States to present evidence supporting the factual basis. In response to that directive, the United States presented the testimony of Special Agent Todd Willard of the Bureau of Alcohol, Tobacco and Firearms. The court also inquired of defendant's counsel, Michael Frazier, Esquire, whether he was satisfied that if the case were to go to trial, there would be no meritorious legal defense that could be offered on defendant's behalf. In response to that inquiry, Mr. Frazier indicated that he was satisfied that there was no viable defense available. Accordingly, the court accepted the plea and directed the preparation of a Presentence Report in anticipation of sentencing.

Between the time of the plea hearing and the scheduled sentencing hearing, a probation officer prepared a Presentence Investigation Report. In that Report, the probation officer determined that defendant did, in fact, qualify as an armed career criminal.

On May 12, 2003, defendant appeared before the court for the purposes of sentencing. At that time, he attempted to withdraw his guilty plea. After reviewing the relevant factors with regard to

the withdrawal of a guilty plea as set forth by the United States Court of Appeals in United States v. Moore, 931 F. 2d 245 (4th Cir.), cert. denied, 502 U.S. 857 (1991), the court denied defendant's motion. In denying defendant's motion, the court concluded, *inter alia*, that defendant could not make a credible showing that he was innocent of the charges to which he had pled guilty. See, Sentencing Transcript, attached hereto as Exhibit B.

After rejecting the attempt to withdraw the plea, the court concluded that defendant did satisfy the standard for qualifying as an armed career offender. The resulting criminal history category of VI, applicable to such a status, produced a Guideline range of 180 to 210 months. The district court sentenced defendant at the bottom of the Guidelines to a term of 180 months imprisonment.

Following the imposition of sentence, defendant pursued a direct appeal with the United States Court of Appeals for the Fourth Circuit contending that the district court had abused its discretion in refusing to allow him to withdraw the plea. That contention was rejected by the United States Court of Appeals for the Fourth Circuit. See, United States v. Mooney, No. 03-4433 (4th Cir. Mar. 22, 2004) (unpublished) (copy enclosed).

On September 16, 2004, defendant filed the instant Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255. As grounds for relief, defendant contends that his attorney, Michael Frazier, Esquire, provided constitutionally defective representation in the

course of the plea negotiations. Citing both Strickland v. United States, 466 U.S. 668 (1984) and Hill v. Lockhart, 474 U.S. 52 (1985), defendant contends that, as a consequence of Mr. Frazier's erroneous advice, he entered into a guilty plea that was involuntary inasmuch as he did have meritorious legal defense to the charge of felon in possession. The United States respectfully submits that defendant's allegations do not withstand scrutiny.

ARGUMENT

DEFENDANT HAS FAILED TO DEMONSTRATE THAT THE ADVICE OF HIS ATTORNEY WITH REGARD TO THE GUILTY PLEA WAS CONSTITUTIONALLY DEFECTIVE.

Under the standards for assessing ineffective assistance of counsel, as articulated by the United States Supreme Court in Strickland v. Washington, a movant seeking to assert defective representation must demonstrate a departure from reasonable competence by an attorney that results in prejudice to the client. With regard to a guilty plea, the movant must demonstrate that absent the unprofessional and prejudicial conduct of the attorney, he would not have pled guilty, but rather would have insisted upon proceeding to trial. Hill v. Lockhart, 474 U.S. 52, 58 (1985). In the instant Motion to Vacate Sentence, defendant argues that when Mr. Frazier indicated that there was no meritorious legal defense to the charge of felon in possession brought against him, his attorney failed to recognize the affirmative defense of

justification as recognized in United States v. Crittendon, 883 F. 2d 326 (4th Cir. 1989) and United States v. Perrin, 45 F. 3d 869, 873-74 (4th Cir. 1995). Defendant essentially argues that he could have satisfied the test articulated by the court in Crittendon by demonstrating that, at the time he possessed the firearm, he was under unlawful and present threat of death or serious bodily injury, that he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct, that he had no reasonable legal alternative to both the criminal act and the avoidance of the threat, and that there was a direct causal relationship between the criminal action and the avoidance of the threat and harm. In essence, defendant contends that he had to take the gun away from his ex-wife to avoid the harm with which he was being threatened and that his possession was, therefore, within the bounds of the justification defense. Defendant further contends that by failing to recognize that fact, Mr. Frazier provided defective representation.

In essence, the district court has already considered the substance of the claim defendant has raised as grounds for collateral relief. In rejecting defendant's attempt to withdraw his guilty plea, the court noted that if defendant's ex-wife had been brandishing a gun or threatening him with it and he had taken the gun from her and thrown it in the garbage, there might be a defense to the charge. The court recognized, however, that even if

defendant had a good reason to seize the gun, by walking out of the house and going to another location with the gun in his possession, he had broken the link between the purported necessity defense and his continued possession.

In this case, the record is clear. Defendant took the gun, belonging to his ex-wife, into his possession. Whether that was a result of a threat by his ex-wife or not, defendant clearly had an opportunity at that time to call the police or otherwise place the gun outside his ex-wife's control without continuing to carry it in the fashion that he did. By leaving the residence, walking to another location, without ever calling the police, defendant possessed the firearm in a manner that was inconsistent with the factors articulated by the Fourth Circuit in Crittendon and Perrin. Mr. Frazier personally recognized that fact when he indicated that defendant did not have a meritorious legal defense. The district court, implicitly agreed when the court noted that it would not have allowed defendant to argue the justification defense to the jury in light of the evidence against him.

It has always been apparent in this case that defendant was unhappy about his status as an armed career offender. Nevertheless, the underlying conviction was clearly appropriate, the guilty plea was voluntarily entered and defendant cannot escape the consequences of his conduct by a meritless assertion of ineffective assistance of counsel.

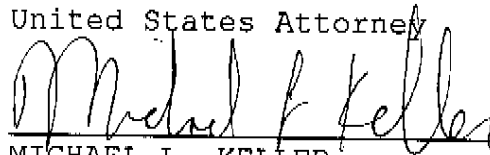
CONCLUSION

For the foregoing reasons, the Motion to Vacate Sentence filed on behalf of John David Mooney should be denied.

Respectfully submitted,

KASEY WARNER
United States Attorney

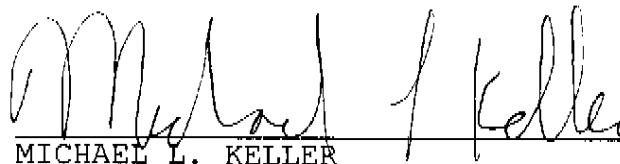
By:


MICHAEL L. KELLER
Assistant United States Attorney

CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing "UNITED STATES RESPONSE TO MOVANT JOHN DAVID MOONEY'S MOTION TO VACATE SENTENCE PURSUANT TO 28 U.S.C. § 2255," has been made on the following by mailing a true copy thereof this 30 day of March, 2005, addressed as follows:

John David Mooney
Inmate Number 04890-088
F.C.I. Gilmer
Post Office Box 6000
Glenville, West Virginia 26351


MICHAEL L. KELLER
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT HUNTINGTON

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 3:02-00231

JOHN DAVID MOONEY,

Defendant.

Huntington, West Virginia
February 26, 2003

TRANSCRIPT OF GUILTY PLEA
BEFORE THE HONORABLE ROBERT C. CHAMBERS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:

MILLER A. BUSHONG, III, ESQ.
Assistant United States Attorney
P. O. Box 1713
Charleston, WV 25326

For the Defendant:

W. MICHAEL FRAZIER, ESQ.
FRAZIER & FRAZIER
P. O. Box 2808
Huntington, WV 25309

Probation Officer:

LARRY CRAWFORD

Defendant Present in Person.

Court Reporter:

---TERESA M. RUFFNER, RPR
P. O. Box 1570
Huntington, WV 25716
(304) 528-7583

Proceedings recorded by mechanical stenography; transcript
produced by computer-aided transcription.

GOVERNMENT
EXHIBIT

CASE
NO. 3:04-1001

EXHIBIT
NO. A

1 Wednesday, February 26, 2003 at 10:35 a.m. in open court

2 THE COURT: Are we ready to proceed?

3 MR. FRAZIER: Yes, Your Honor.

4 MR. BUSHONG: The United States is ready.

5 THE COURT: All right. Mr. Frazier, Mr. Mooney,
6 would you please stand.

7 Mr. Frazier, I understand that Mr. Mooney has decided to
8 plead guilty to the count in the indictment; is that correct?

9 MR. FRAZIER: That's correct, Your Honor.

10 THE COURT: All right. Mr. Mooney, I have to ask
11 you a number of questions in this proceeding, so my clerk is
12 going to swear you in.

13 CLERK JUSTICE: Please raise your right hand.

14 (The defendant was duly sworn.)

15 THE COURT: All right. Mr. Mooney, do you
16 understand you're now under oath and if you answer any of my
17 questions falsely, you could be prosecuted for perjury or for
18 making a false statement?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Would you state your full name.

21 THE DEFENDANT: John David Mooney.

22 THE COURT: How old are you, Mr. Mooney?

23 THE DEFENDANT: I'll be 48 April 10th.

24 THE COURT: How much education have you had?

25 THE DEFENDANT: Ninth grade.

1 THE COURT: Can you read and write?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Have you recently been under the care of
4 any doctor or psychiatrist or other medical professional for
5 any serious physical or emotional illness?

6 (The defendant and Mr. Frazier conferred privately off
7 the record.)

8 THE DEFENDANT: No, sir.

9 THE COURT: Are you currently using any type of
10 medication, controlled substances or alcohol?

11 THE DEFENDANT: No, sir.

12 THE COURT: Are you able to understand fully what's
13 going on here in court today?

14 THE DEFENDANT: I believe so.

15 THE COURT: Mr. Frazier, do you have any reason to
16 question the competence of your client?

17 MR. FRAZIER: No, sir.

18 THE COURT: All right. Mr. Mooney, I find you're
19 competent and capable of entering an informed plea.

20 Have you had enough time to discuss this case with your
21 attorney?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Has he been able to answer your
24 questions about how you should proceed?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: I'm going to need you to speak up just a
2 little bit so I can hear you.

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Are you completely satisfied with the
5 legal advice Mr. Frazier has given you?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Mr. Frazier, has Mr. Mooney been
8 cooperative with you?

9 MR. FRAZIER: Very much so, Your Honor.

10 THE COURT: Have you had enough time to investigate
11 the case and discuss it with him?

12 MR. FRAZIER: Yes, sir.

13 THE COURT: All right. I understand there's a
14 proposed plea agreement.

15 Mr. Frazier, would you summarize the provisions of the
16 plea agreement in each paragraph.

17 MR. FRAZIER: Your Honor, we're going to enter a
18 plea that he's charged in a one-count indictment, a felon in
19 possession.

20 Paragraph 2 states that he'll plead guilty to that
21 violation as charged in the indictment.

---22 Paragraph 3, the maximum potential penalty that, he will
23 be exposed to by virtue of his plea is imprisonment for a
24 period of ten years, a fine of \$250,000 or twice the gross
25 pecuniary gain, whichever is greater, a term of supervised

1 with your lawyer before you signed this plea agreement?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Do you want me to accept the plea
4 agreement?

5 THE DEFENDANT: Yes.

6 THE COURT: Well, I'm going to defer accepting the
7 plea agreement until I can review a presentence report on you,
8 Mr. Mooney, but the original plea agreement may be filed as a
9 part of the record in this case.

10 Mr. Mooney, have you read the indictment returned against
11 you?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: I'm now going to --

14 MR. BUSHONG: Sorry, Your Honor.

15 THE COURT: Go ahead.

16 (Mr. Bushong and Clerk Justice conferred privately off
17 the record.)

18 THE COURT: I'm now going to read to you the
19 indictment in this case and then ask for your plea.

20 This is styled United States of America versus John David
21 Mooney. Indictment. The Grand Jury Charges:

22 1. On-or about August 4, 2002, at or near Huntington,
23 Cabell County, West Virginia, and within the Southern District
24 of West Virginia, defendant John David Mooney did knowingly
25 possess a firearm, that is, a Charter Arms, model Off Duty,

1 unless it's in excess of the statutory maximum.

2 At final disposition it's agreed that you have the sole
3 discretion now to sentence this man and the Government is not
4 going to make any recommendation, but they do reserve the
5 right to inform you as to the relevant facts and conduct, to
6 address you with respect to the nature and seriousness of the
7 offense, to respond to any questions the Court might raise, to
8 correct any inaccuracies or inadequacies in the presentence
9 report, to respond to any statements that I might make or that
10 Mr. Mooney might make on his own behalf, to advise the Court
11 of Mr. Mooney's cooperation and to address the Court regarding
12 the issue of his acceptance of responsibility.

13 In paragraph 10 it's agreed that if either party violates
14 the terms of this agreement, either side has the right to void
15 it. And if the Court refuses to accept this agreement, it
16 shall be void.

17 And that pretty much summarizes the entire plea
18 agreement.

19 THE COURT: All right. Is that a fair summary of
20 the agreement, Mr. Bushong?

21 MR. BUSHONG: Yes, Your Honor.

22 THE COURT: Mr. Mooney, do you understand what this
23 agreement does and what it requires of you?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Did you go over each of these provisions

1 release of three years, a special assessment of a hundred
2 dollars, and an order of restitution pursuant to U. S. Code
3 Section 18 3663.

4 Alternatively, if the Court finds that he is an armed
5 career criminal, his potential in this case, the maximum
6 statutory penalty will be 15 years' imprisonment, up to life,
7 a fine of \$250,000 or twice the gross pecuniary gain, a term
8 of supervised release of five years, the hundred dollar
9 special assessment, and the order of restitution.

10 In addition, the special assessment, he submitted
11 certified financial statements -- I have those here; they
12 haven't been submitted yet -- reflecting that he's without
13 sufficient funds to pay the special assessment. And if
14 incarcerated, he agrees to join the Inmate Financial
15 Responsibility Program and use his earnings to pay the special
16 assessment.

17 Paragraph 5 says he'll be completely forthright and
18 truthful.

19 Paragraph 6 gives him use immunity so that anything he
20 says at this plea hearing or any debriefing will not be used
21 against him in any further prosecution unless the Government
22 has evidence outside of what he tells them, which is contained
23 in the seventh paragraph, the limitations on immunity.

24 Appeal of the fine. Both parties agree they are not
25 going to seek appellate review of any order imposing a fine

1 .38 caliber revolver, in and affecting interstate commerce.

2 2. At the time defendant John David Mooney possessed the
3 aforesaid firearm, he had been convicted of crimes punishable
4 by imprisonment for a term exceeding one year, as defined in
5 18, United States Code, Section 921(a)(20), that is,

6 a. Convicted on or about May 13, 1982 in the Court
7 of Common Pleas, Lawrence County, Ohio, of burglary, in
8 violation of Ohio Revised Code, Section 2911.12;

9 b. Convicted on or about June 3, 1983 in the
10 Circuit Court of Cabell County, West Virginia, of attempt to
11 commit non-aggravated robbery, in violation of West Virginia
12 Code, Section 62-2-12; and

13 c. Convicted on or about June 12, 1989 in the
14 Circuit Court of Cabell County, West Virginia, of aggravated
15 robbery, in violation of West Virginia Code, Section 61-2-12.

16 In violation of Title 18, United States Code, Sections
17 922(g)(1) and 924(a)(2).

18 All right. Mr. Mooney, how do you plead to that charge?

19 THE DEFENDANT: Guilty, sir.

20 THE COURT: All right. Before I accept your guilty
21 plea, I want to go over several things with you.

22 First, I want to make sure there's a factual basis for
23 your guilty plea. Then I want to make sure that you
24 understand the nature of the charge against you and the
25 consequences of pleading guilty to that charge, that you

1 understand the constitutional and other legal rights you give
2 up when you plead guilty and that you're pleading guilty
3 voluntarily.

4 First, let's go over the charge in more detail. You're
5 charged with violating Section 922(g)(1). That section
6 states, in part, it shall be unlawful for any person who has
7 been convicted in any court of a crime punishable by
8 imprisonment for a term exceeding one year knowingly to
9 possess in or affecting interstate commerce any firearm or
10 ammunition.

11 Section 924(a)(2) provides, whoever knowingly violates
12 subsection (g) of 922 shall be guilty of a crime against the
13 United States.

14 Now, Mr. Mooney, if the Government had to go to trial in
15 this case, the Government would have to prove the following
16 elements against you beyond a reasonable doubt:

17 First, that you have been convicted in any court of a
18 crime punishable by imprisonment for a term exceeding one
19 year, and two, you knowingly possessed the firearm described
20 in the indictment, and three, such possession was in or
21 affecting interstate commerce.

22 Now, you were previously convicted of burglary in
23 violation of Ohio Revised Code, Section 2991.12, of attempt to
24 commit non-aggravated robbery in West Virginia in violation of
25 61-2-12, and aggravated robbery in violation of the same

1 statute in West Virginia. All of these are crimes punishable
2 by imprisonment for a term exceeding one year.

3 Now, a "firearm" means any weapon which will or is
4 designed to or may readily be converted to expel a projectile
5 by the action of an explosive, the frame or receiver of such
6 weapon, any firearm muffler or silencer or any other
7 destructive device. The term "firearm" does not include an
8 antique firearm.

9 "To possess" means to exercise authority, control or
10 dominion over something.

11 An act is done "knowingly" if it's done voluntarily and
12 intentionally and not because of a mistake or accident or some
13 innocent reason.

14 Last, "in or affecting interstate commerce" means
15 commerce between any place in one state and any place outside
16 of that state.

17 Now, considering this explanation, Mr. Mooney, do you
18 believe you're guilty of the charge contained in this
19 indictment?

20 THE DEFENDANT: I did have a gun.

21 THE COURT: All right. Do you believe you're guilty
22 of this charge?

23 If you don't believe you're guilty, now is the time to
24 say so for sure.

25 THE DEFENDANT: The circumstances surrounding it --

1 MR. FRAZIER: I know what he's hung up on, if you'll
2 give me just a moment.

3 THE COURT: Go ahead.

4 (Mr. Frazier and the defendant conferred privately off
5 the record.)

6 THE COURT: All right. Mr. Mooney, do you believe
7 you're guilty of this charge?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Tell me what you did that makes you
10 guilty.

11 THE DEFENDANT: I had the gun. I mean --

12 THE COURT: Speak up. I can't hear you very well.

13 THE DEFENDANT: I had the gun.

14 THE COURT: Well, you say you had the gun. Are you
15 talking about this Charter Arms .38 caliber revolver?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: All right. What do you mean you had it?
18 Were you holding it?

19 (Mr. Frazier and the defendant conferred privately off
20 the record.)

21 THE COURT: Just tell me. I don't know what
22 happened. I don't know anything about your case --

23 THE DEFENDANT: I took the gun to give it to the
24 Huntington Police Department, and the Huntington Police
25 Department took it away from me and charged me with it.

1 THE COURT: All right. What do you mean you took
2 the gun?

3 THE DEFENDANT: My wife was drinking the night that
4 she had the gun out and I was scared. I took it to get it out
5 of the house for my own safety.

6 THE COURT: All right. So your wife was drinking
7 and she had this gun?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: And you took it from her?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: And you then tried to take it to the
12 Huntington Police Department?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: And they arrested you for possessing the
15 gun at that time?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Mr. Frazier --

18 MR. FRAZIER: Well, Your Honor, I think where the
19 confusion comes in, he wasn't -- he didn't, like, take it to
20 the Huntington Police Department and say, "Here's a gun" and
21 they arrested him.

22 His intention was to turn the gun over. Unfortunately,
23 before he got that opportunity, he stopped at a bar and his
24 wife had called 911 and said, you know, "My husband has got
25 this gun," and everything went to hell in a hand basket,

1 basically. But he had -- the police didn't arrest him while
2 he was turning it in is what I understand.

3 THE COURT: All right. Well, tell me how this
4 happened, Mr. Mooney.

5 THE DEFENDANT: Well --

6 THE COURT: You were what, at your house with your
7 wife and she's drinking?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: And --

10 THE DEFENDANT: About 2:00 in the morning. And she
11 pulled the gun out. She had pulled it out previously before,
12 and I was scared of it. So I took it away from her.

13 I called a guy that has a bar up here that's a friend of
14 mine, and I told him that I was coming up there. And she
15 heard it and she called the police and had them there.

16 THE COURT: All right. So you took the gun with you
17 and went to this bar?

18 THE DEFENDANT: The bar was closed. I mean --

19 THE COURT: Oh, all right. So you went to --

20 THE DEFENDANT: That's where I -- yeah, I was going
21 to call the Huntington Police as soon as I got there. When I
22 got there, the Huntington Police was waiting in the lot.

23 THE COURT: And where did you have the gun with you
24 at that time?

25 THE DEFENDANT: In my pocket.

1 THE COURT: All right. And you're saying as you
2 pulled into this parking lot where this bar was, the police
3 were already there waiting?

4 THE DEFENDANT: I walked there.

5 THE COURT: You walked there?

6 THE DEFENDANT: Yeah. It's just a few blocks up the
7 street from my home.

8 THE COURT: All right. So they arrested you at that
9 time and you had the gun --

10 THE DEFENDANT: Yes, sir.

11 THE COURT: -- with you. Did this happen on or
12 about August 4, 2002?

13 THE DEFENDANT: I believe so, sir.

14 THE COURT: All right. And were you here in
15 Huntington, Cabell County, West Virginia, when this occurred?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: All right. You can sit down for a few
18 minutes.

19 Mr. Bushong, do you want to offer testimony to show what
20 the Government could prove?

21 MR. BUSHONG: Your Honor, the United States calls
22 Special Agent Todd Willard.

23 TODD WILLARD, GOVERNMENT'S WITNESS, SWORN

24 DIRECT EXAMINATION

25 BY MR. BUSHONG:

Willard - Direct

1 Q. Special Agent Willard, you're employed by ATF?

2 A. Yes, sir, that's correct.

3 Q. You've been with ATF for how long?

4 A. Over 15 years.

5 Q. Did you have a role in investigating the case of United
6 States versus John David Mooney?

7 A. Yes, sir, I did.

8 Q. You're familiar with the case?

9 A. Yes, sir, I am.

10 Q. He was arrested on August 4, 2002 in Huntington; is that
11 correct?

12 A. That is correct.

13 Q. What location was he arrested in?

14 A. He was arrested in Whisman's Bar down on the West End of
15 Huntington.

16 Q. Who arrested him? What agency?

17 A. The Huntington Police Department.

18 Q. The Huntington Police Department arrived on the scene of
19 that bar in the early morning hours of August 4, 2002. Why is
20 that?

21 A. The Cabell County 911 had received a call. The caller --
22 whoever called was not actually speaking directly to 911, but
23 the phone line was open. The 911 operator could hear -- and
24 it's recorded; we have the tape -- a male and female arguing.
25 The female is trying to get the male to give her the

Willard - Direct

1 firearm. The male replies, "You're not going to pull the gun
2 on me anymore." The female says -- asks him if he wants to go
3 to jail. The male says no, he's not afraid of going to jail.

4 She keeps trying to get him to give the firearm. The
5 phone cuts off. 911 calls the number back. They're still
6 arguing. They hear the lady say, "John, give me the gun."

7 He basically just leaves the residence. The line is cut
8 off again. Then she calls back. Miss McCloud, who is
9 Mr. Mooney's ex-wife, says that her ex-husband broke into her
10 house, gives a description of what he's wearing and says that
11 he has a gun and that he's on his way to Whisman's.

12 She gives his description, tells that he doesn't have a
13 shirt, because she had ripped his shirt off.

14 The officer, Sexton, who was at the complainant's house,
15 Miss McCloud's house, advises other officers -- three other
16 officers, actually -- who went to Whisman's Bar. Whisman's
17 was closed. They pecked on the door, got Mr. Mooney out, and
18 he had the firearm in his pants pocket, the Charter Arms.

19 Q. So the person you were referring to on the 911 call when
20 you said "he" and "she" is, in effect, what --

21 A. Yes, Miss McCloud --

22 Q. -- the defendant's ex-wife? Did you interview her?

23 A. Yes, I did.

24 Q. Does she claim that the defendant broke into her home in
25 the early morning hours of August 4, 2002 --

Willard - Direct

1 A. Yes.

2 Q. -- and removed her firearm from the house?

3 A. Yes. She gives a little different story than the 911
4 tape, but she says that he did take the firearm and it was --
5 but that he did come into her house and it wasn't where -- she
6 said he woke her up from a sound sleep at 2:00 in the morning,
7 so --

8 Q. All right. The firearm was seized by the Huntington
9 Police Department. Did you have an opportunity to test-fire
10 it?

11 A. Yes, sir, I test-fired the Charter Arms revolver and it
12 was found to function as designed.

13 Q. When it was seized, was it loaded? Do you remember?

14 A. No, sir, it was not.

15 Q. All right. And where was that firearm manufactured?

16 A. That was manufactured in the State of Connecticut.

17 Q. So it necessarily traveled in interstate commerce?

18 A. Yes, sir. It was recovered in West Virginia.

19 Q. The defendant has been convicted of three felonies. In
20 1982 he was convicted in Ohio of burglary. Is that correct?

21 A. That's correct.

22 Q. In 1983 he was convicted in West Virginia of attempt to
23 commit non-aggravated robbery?

24 A. Yes, sir.

25 Q. And in 1989 he was convicted in West Virginia of

Willard - Direct/Cross

1 aggravated robbery?

2 A. That is correct.

3 Q. Have you researched as to whether the defendant applied
4 to have his civil rights restored in either Ohio or West
5 Virginia?

6 A. Yes, sir, I have, and he has not been given his rights to
7 possess a firearm.

8 MR. BUSHONG: That's all I have, Your Honor.

9 THE COURT: Any questions?

10 CROSS EXAMINATION

11 BY MR. FRAZIER:

12 Q. Officer Willard, Mr. Mooney did voluntarily turn this gun
13 over at the bar, correct? I mean they didn't have to go in
14 and take it from him. He handed it over and admitted he had
15 the gun, correct?

16 A. When I interviewed the sergeant, the sergeant said that
17 when they went into Whisman's, the door was actually locked,
18 and they pecked on the door and that they unlocked the door.
19 Mr. Mooney came out. And I guess he really didn't have a
20 chance to do anything. You know, they got him. Since he had
21 the gun, they patted him down and found the firearm on him.
22 But he didn't resist, no, sir.

23 MR. FRAZIER: That's all.

24 THE COURT: All right. You may step down, Agent.

25 Thank you.

1 All right. Mr. Mooney, Mr. Frazier, if you'd again
2 please stand.

3 All right. Mr. Mooney, you heard that testimony, didn't
4 you?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: I take it that you dispute what your
7 ex-wife said started this argument between the two of you; is
8 that right?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: But you admit that you did get the gun
11 from her and that you kept the gun in your possession when you
12 went to Whisman's Bar and you still had it in your possession
13 when you were arrested?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: All right. And you agree that you have
16 been convicted of these three charges outlined in the
17 indictment and that your rights have never been restored?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: All right. Mr. Frazier, are you
20 satisfied that if this case went to trial, there would be no
21 meritorious legal defense to this charge?

22 MR. FRAZIER: That's correct, Your Honor--

23 THE COURT: Are you satisfied that Mr. Mooney's
24 constitutional and other rights have been observed fully?

25 MR. FRAZIER: Yes, sir.

1 THE COURT: All right. Mr. Mooney, I find that
2 there's a sufficient factual basis for your guilty plea.

3 Now I want to go over the penalties that you'll be
4 exposed to.

5 First, do you understand you're pleading guilty to a
6 felony offense and if I accept your plea, you'll be adjudged
7 guilty of that felony?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Do you understand that that judgment may
10 deprive you of valuable civil rights, such as your right to
11 vote, your right to hold public office, your right to serve on
12 a jury, and your right to possess any kind of firearm or gun?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Now, do you also understand that if you
15 qualify as an armed career criminal pursuant to 18, United
16 States Code, Section 924(e) -- and that's all based upon your
17 criminal history, the actual convictions that you have -- that
18 you expose yourself to imprisonment for a period of at least
19 15 years and maybe up to life by entering in this plea
20 agreement?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Do you understand that even if you're
23 not found to be an armed career criminal, that you still
24 expose yourself to a maximum penalty of ten years'
25 imprisonment under this plea agreement?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Do you understand that in addition to
3 this, you'll be subject to a supervised release term of as
4 much as five years if you're found to be an armed career
5 criminal or as much as three years if you're not an armed
6 career criminal?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Do you understand that supervised
9 release means after imprisonment, you would be supervised by
10 the probation office under conditions set by the Court?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: And do you understand if you violate the
13 terms of supervised release, the Court can revoke it and send
14 you back to prison as a result?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Do you understand you could also be
17 required to pay a fine of up to \$250,000 or twice the amount
18 of gain or loss resulting from your conduct?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Do you understand you'd also be required
21 to pay the \$100 special assessment for having been convicted
22 of a felony offense?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Do you understand in the plea agreement,
25 you've agreed to pay that special assessment by participating

1 in the Inmate Financial Responsibility Program?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Do you understand that in addition to
4 this, you may also be required to make restitution if there
5 are any crime victims?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Have you and your lawyer discussed the
8 sentencing guidelines and how they might apply to your case?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Do you understand that the Court cannot
11 determine the guideline range for your case until this
12 presentence report is done and both you and the Government
13 have a chance to look at it and challenge it if you think it's
14 wrong?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Do you understand that the sentence I
17 could impose may be different from any estimate your lawyer
18 has given you?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Do you understand that although I have
21 to consider these sentencing guidelines, I do have authority
22 in some cases to impose a sentence that's more severe and in
23 other cases less severe than the guidelines would require?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Do you understand that parole has been

1 abolished and you will not be released on parole if you're
2 sent to prison?

3 (The defendant and Mr. Frazier conferred privately off
4 the record.)

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Do you understand that even if you do
7 not like the sentence I impose upon you, you will still be
8 bound by this guilty plea and you will have no right to
9 withdraw it?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Do you understand that you may have the
12 right to appeal your conviction if you believe your guilty
13 plea was unlawful or involuntary or if there's some other
14 fundamental defect in these proceedings that you haven't
15 waived by pleading guilty?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Do you understand that both you and the
18 Government may have the right to appeal the sentence I impose?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: In the plea agreement, you agreed to
21 give up your right to appeal a fine unless the amount of the
22 fine is above the guideline range. Generally, you're bound by
23 such waivers, but if you don't believe you are, you'd have to
24 present that theory to an appeals court. Do you understand
25 that?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Do you understand that with few
3 exceptions, any notice of appeal must be filed within ten days
4 of judgment being entered in your case?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Mr. Mooney, I find that you understand
7 the nature of the charge and the consequences of a guilty
8 plea.

9 Now I want to go over the constitutional and other legal
10 rights you give up when you plead guilty.

11 Do you understand you have a right to plead not guilty to
12 this charge?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Do you understand that by pleading
15 guilty, you're giving up your right to a speedy and public
16 trial by a jury?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Do you understand that by pleading
19 guilty, you're giving up your right to force the Government to
20 produce witnesses and evidence against you?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Do you understand that you would be
23 presumed innocent until the Government presented enough
24 evidence to convince a judge and a jury beyond a reasonable
25 doubt that you were guilty?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Do you understand that when you admit
3 your guilt, as you have here, you relieve the Government of
4 the burden of proving your guilt at a trial?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Do you understand that you would have
7 the right to the assistance of your lawyer at trial?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Do you understand that you and your
10 lawyer could confront the witnesses and he could cross-examine
11 them to test the truth of what they said?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Do you understand that by pleading
14 guilty, you give up that right?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Do you understand that if you desired to
17 go to trial and wanted to call witnesses, you'd be entitled to
18 have the Marshal's Office bring witnesses to court under
19 subpoena?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: And do you understand that by pleading
22 guilty, you're giving up your right to call witnesses-except
23 for the limited purposes of a sentencing hearing?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Do you understand you would have the

1 right to go to trial and remain silent? That is, you wouldn't
2 have to take the witness stand or even present any evidence if
3 you didn't want to.

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Do you understand that I would instruct
6 the jury they could not convict you just because you exercised
7 your constitutional right and that they could convict you only
8 if the Government proved its case beyond a reasonable doubt?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Mr. Mooney, I find you understand the
11 constitutional and other legal rights you're giving up by
12 pleading guilty.

13 Knowing all this, do you still want to plead guilty at
14 this time?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Has anyone forced you or threatened you
17 or coerced you or talked you into pleading guilty against your
18 will?

19 THE DEFENDANT: No, sir.

20 THE COURT: Are you acting voluntarily and of your
21 own free will in entering this guilty plea?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Is pleading guilty your own idea?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Has anyone promised you anything or told

1 you something different from what we've discussed today to get
2 you to plead guilty?

3 THE DEFENDANT: No, sir.

4 THE COURT: All right. I find your guilty plea is
5 voluntary.

6 Mr. Mooney, do you have any questions or second thoughts
7 about pleading guilty?

8 THE DEFENDANT: No, sir.

9 THE COURT: If not, I'm going to ask that you step
10 up here to the clerk's desk and sign a plea of guilty.

11 CLERK JUSTICE: "In the presence of Michael Frazier,
12 my counsel, who has fully explained the charge contained in
13 the indictment against me, and having received a copy of the
14 indictment before being called upon to plead, I hereby plead
15 guilty to the charge contained in the indictment."

16 (The written plea of guilty was executed.)

17 THE COURT: All right. The record may reflect
18 that Mr. Mooney has executed the plea of guilty, his lawyer
19 signed it, and it's been tendered to the clerk for filing.

20 In the case of United States of America versus John David
21 Mooney, I find that Mr. Mooney is fully competent and capable
22 of entering an informed plea, there's a sufficient factual
23 basis for his guilty plea, he understands the nature of the
24 charge and the consequence of a guilty plea, he understands
25 the constitutional and other legal rights he's giving up

1 because of the plea, and his plea is voluntary.

2 Mr. Mooney, I've deferred accepting the plea agreement
3 until I can review a presentence report on you, but I do
4 accept your guilty plea. You are now adjudged guilty and
5 stand convicted of violating 18, United States Code, Section
6 922(g)(1) and 924(a)(2).

7 I direct the probation office to conduct a presentence
8 investigation, draft a report and disclose it to the
9 Government and the defendant by April 7. Counsel may make
10 objections no later than April 21. The final report will be
11 due to the Court by May 5. I'm going to set this case down
12 for sentencing on May 12, 2003 at 10:30 a.m.

13 The defendant is currently detained. Does the defendant
14 want to offer any testimony or argument about whether that
15 should continue?

16 MR. FRAZIER: No, Your Honor.

17 THE COURT: All right. The defendant will remain in
18 custody pending sentencing.

19 Is there anything else the Court need address in this
20 case?

21 MR. FRAZIER: No, sir.

22 MR. BUSHONG:- No, Your Honor.

23 THE COURT: If not, we stand adjourned.

24 (Hearing concluded at 11:02 a.m.)

25 I, Teresa M. Ruffner, certify that the foregoing is a

1 correct transcript from the record of proceedings in the
2 above-entitled matter.

3 Gerard M. Ruffner June 24, 2003
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT HUNTINGTON

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 3:02-00231

JOHN DAVID MOONEY,

Defendant.

Huntington, West Virginia
May 12, 2003

TRANSCRIPT OF MOTION TO WITHDRAW GUILTY PLEA AND SENTENCING
BEFORE THE HONORABLE ROBERT C. CHAMBERS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:

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Assistant United States Attorney
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Charleston, WV 25326

For the Defendant:

W. MICHAEL FRAZIER, ESQ.
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Defendant Present in Person.

Court Reporter:

TERESA M. RUFFNER, RPR
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GOVERNMENT
EXHIBIT

CASE
NO. 3:04-1001

EXHIBIT
NO. B

Proceedings recorded by mechanical stenography; transcript
produced by computer-aided transcription.

1 Monday, May 12, 2003 at 11:03 a.m. in open court

2 THE COURT: All right. Are we ready to proceed?

3 MR. BUSHONG: The United States is ready, Your
4 Honor.

5 MR. FRAZIER: Yes, sir.

6 THE COURT: All right. Mr. Frazier, Mr. Mooney,
7 would you please stand.

8 Mr. Mooney, I may have to ask you some questions during
9 this hearing, so my clerk is going to swear you in.

10 CLERK JUSTICE: Please raise your right hand.

11 (The defendant was duly sworn.)

12 THE COURT: All right. Before we proceed to
13 sentencing, Mr. Frazier has advised the Court, Mr. Mooney,
14 that you are reconsidering your guilty plea and that you may
15 ask the Court to allow you to withdraw your guilty plea. Is
16 that correct?

17 THE DEFENDANT: That's correct, sir.

18 THE COURT: All right. I need you to speak up
19 louder than that so I can hear you.

20 Mr. Frazier, have you had a chance to discuss with
21 Mr. Mooney whatever basis he may have or believe he has --

22 MR. FRAZIER: Yes, Your Honor.

23 THE COURT: -- to withdraw his plea?

24 MR. FRAZIER: I explained under Rule 32(d), I think,
25 we have to show that there's a fair and just reason. I forget

1 the exact language for it. And there's those six factors that
2 the Court is aware of.

3 I've explained to him, you know, this is something that
4 the Court may allow and may not allow him, and it's something
5 that I think before you can decide that, you actually probably
6 need to hear us out on those six factors.

7 With the Court's permission, I'd like to --

8 THE COURT: All right. Why don't you outline for me
9 what his reasoning would be.

10 MR. FRAZIER: Judge, the six factors -- and I quote
11 here from this United States v. Ubakanma, 215 F.3d 421, which
12 is a Fourth Circuit 2000 case, and it cited some of these --
13 these six reasons.

14 The first are -- the first is whether the defendant
15 provided credible evidence that his plea was knowing or
16 voluntary.

17 And I can tell the Court that his plea was based on an
18 assumption that he had three predicate violent felony
19 offenses. We knew that there was a potential he could be an
20 armed career criminal. And he and I discussed that.

21 In the indictment, it lists three. Throughout most
22 everything I had, there's these three offenses, one of which I
23 can make, and I did make in my objections, at least what I
24 think is a good faith argument that it should not count as a
25 violent felony.

1 So his plea was based on the fact that we thought he had
2 three and that we had a decent chance of throwing one of them
3 out, in which case he would not be an armed career criminal.

4 It turns out, after the presentence report, after my
5 objections were filed, that one of those three predicates
6 actually had two subparts. And I think he pled in June --
7 June 12th of 1989. What I had been, at least in my mind,
8 arguing was one offense actually was two offenses.

9 And I think there's no question that under the law, under
10 the armed career criminal that what matters is how many
11 occasions. And these are definitely different and distinct
12 occasions.

13 So now we've got four predicate offenses. And even if I
14 win my argument, we're back to three and he is an armed career
15 criminal. That's basically where we're coming from. That's
16 what, I think, has triggered this motion to withdraw.

17 His -- you know, I can represent to the Court I did -- I
18 went through it over the weekend. I went through and looked
19 at everything to see if I had evidence that there were four.

20 Their evidence, in looking through some of the computer
21 records -- and probably if I had gone through it a little more
22 carefully, I would have noted they were separate occasions.
23 But, you know, under the indictment, under Mr. Willard's grand
24 jury testimony, there's always talk of these three occasions.

25 So anyway that would be the first factor that we would

1 argue, that while his plea was knowing and voluntary, it was
2 based on an improper assumption.

3 THE COURT: Go ahead.

4 MR. FRAZIER: That's all I have on the first factor
5 I don't know if you want to question him or if there's any --

6 THE COURT: Well, go ahead.

7 MR. FRAZIER: Okay.

8 THE COURT: I'd rather get it all at one time.

9 MR. FRAZIER: The second factor, whether the
10 defendant credibly asserted his legal innocence, Mr. Mooney
11 and I have a slight disagreement on this one.

12 He asserts he's innocent because, while he had possession
13 of the handgun, he was doing it for the right reason. And I
14 don't disagree with that. I think there's plenty of evidence
15 that he was doing it for the right reason. He took this gun
16 away from his wife, who he was afraid was going to shoot him
17 or do something bad, and he took it.

18 I've advised him that, in my opinion, legally that may
19 not be legal innocence because I don't think that the elements
20 of this offense allow for us to make that argument in front of
21 the jury.

22 Mr. Mooney understandably disagrees with that and thinks
23 that he should be allowed to argue to the jury that while,
24 yes, he had possession, that the reasons he had possession
25 should somehow nullify that.

1 The third factor, whether there's a delay between
2 entering the plea and moving for withdrawal, obviously there
3 was. Today is the sentencing date.

4 I would state that until I got the report back -- or I
5 think it was actually a phone call from Miss Miller a week or
6 ten days ago, that was the first time I really -- it hit me
7 that there's four separate offenses, not three. I did not
8 have a chance to go down and see Mr. Mooney last week because
9 I was busy.

10 So to the extent there was any delay, I don't think it
11 was that big a deal because it was only in the last ten days
12 that we actually found out about this.

13 Whether he had close assistance of competent counsel, I
14 argue he did, but the Court may take judicial notice
15 otherwise.

16 Whether the withdrawal will prejudice the Government,
17 again I guess the Government can always argue that trying a
18 case at this point is going to cost more and, you know, have
19 to bring witnesses in. We would argue that's not that big a
20 factor in this case.

21 And whether the withdrawal will inconvenience the Court
22 and waste judicial resources. You know, I obviously have
23 trouble arguing that that's not the case because obviously
24 we've wasted your time here on a plea hearing if we withdraw
25 this.

1 So, again, I think if you look at it based on the fact
2 that this entire thing started based on an erroneous
3 assumption, I think it's at least understandable why we're
4 here today.

5 That would be the substance of my motion.

6 THE COURT: All right. Mr. Mooney, let me ask you,
7 first, when you entered your guilty plea, you knew and
8 understood that you could be punished as an armed career
9 criminal, didn't you?

10 THE DEFENDANT: I'm not guilty of this.

11 THE COURT: Well, first, I want to talk about your
12 plea. Then I want to hear what you say about whether you're
13 actually guilty or not.

14 As Mr. Frazier outlined, the first factor I've got to
15 look at is whether at the time of your plea you made a knowing
16 and intelligent plea. And I know that I asked you at the time
17 of your plea whether you knew and understood the maximum
18 penalties. Do you remember that?

19 THE DEFENDANT: Yes, sir, you did.

20 THE COURT: And I asked you specifically if you
21 understood that you might be subject to being found an armed
22 career criminal. Do you remember that?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: And I told you at that time that if you
25 were found to be an armed career criminal because of your

1 previous convictions, that the penalty would be at least 15
2 years in prison. Is that right?

3 THE DEFENDANT: That's correct, sir.

4 THE COURT: So you knew and understood at the time
5 you entered your plea that if your criminal history included
6 three violent crimes, that you could be subject to this 15-
7 year mandatory minimum, didn't you?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: As you stand here today, can you
10 honestly say that there's anything that Mr. Frazier failed to
11 tell you or explain to you that caused you to enter this
12 guilty plea under some kind of mistake?

13 THE DEFENDANT: Just the assumption that, you know,
14 that I'd be down to a 24 and not a -- that -- Your Honor,
15 maybe I don't understand the Government's law and this, that
16 and the other, but my criminal points is 33. I got my three-
17 point acceptance of 30. It's 165 months. But because it's a
18 career criminal, there is no acceptance. It goes back up to
19 180.

20 THE COURT: Well, I understand that. And to be
21 candid with you, Mr. Mooney, I don't blame you for being upset
22 about facing a very lengthy prison sentence, but I've got to
23 take this a step at a time. And the first thing I would have
24 to find as a judge, before I could let you withdraw your
25 guilty plea, would be that you didn't know or understand what

1 you were pleading guilty to.

2 Now, it's one thing to not like the result. A lot of
3 people stand here and don't like the result. Sometimes I
4 don't like the result. But at this point, I don't know of any
5 reason how I could say that you failed to know and understand
6 what you were doing when you entered your guilty plea. And
7 you haven't told me anything that Mr. Frazier didn't tell you
8 that he should have or told you wrongly.

9 THE DEFENDANT: Well, Your Honor, one other thing,
10 as we've argued here just a little bit ago, but Mr. Miller
11 (sic) and Mr. Willard come down to the Carter County Detention
12 Center and brought a plea agreement down there.

13 We talked and we talked and we talked. He got up to
14 leave. He laid it down there and he said, "If you sign the
15 plea agreement, fine." He said, "If you don't, we'll have no
16 hard feelings." I signed that plea agreement.

17 When I come up here for sentencing, Mr. Frazier brought
18 another one and he said that one was no good. And that -- I
19 mean, you know --

20 THE COURT: Well, I don't know what --

21 MR. FRAZIER: Your Honor, I can clear this up.
22 When we were talking plea, Mr. Bushong and Mr. Willard met
23 Mr. Mooney and I down at the Carter County Jail, and
24 Mr. Bushong brought along, you know, a standard plea
25 agreement. And we talked about it, and, you know, "If you

1 want to plead, sign this."

2 Well, after Mr. Bushong and they left, Mr. Mooney and I
3 talked about it. We went over the plea agreement. The plea
4 agreement states that the maximum potential penalty is
5 imprisonment for a period of ten years.

6 I advised Mr. Mooney at the time down at the jail that I
7 thought this was incorrect, this was an error, because I
8 thought he could be subject to more than that.

9 Nonetheless, Mr. Mooney -- we went ahead and signed it
10 because we thought, well, maybe, you know, the Government
11 knows best, or for whatever reason. And I think by the time I
12 got back, I had a phone call from Mr. Bushong saying, "Wait a
13 minute. I gave you the wrong plea form."

14 I advised Mr. Mooney that even had the Government signed
15 this, which they did not, that I didn't think the Court would
16 accept it because it's based -- it's wrong. I mean, with his
17 record -- this is the standard felon-in-possession plea
18 agreement and not the armed career criminal felon-in-
19 possession.

20 So I understand his -- Mr. Mooney's problem is he's got
21 an agreement from the Government, what he thinks is an
22 agreement from the Government that says he's in prison for a
23 maximum of ten years. And he's right. When we came to the
24 plea, we had the new agreement, which states imprisonment for
25 20 years -- I forget what it is.

1 MR. BUSHONG: Fifteen.

2 MR. FRAZIER: Fifteen years. And that's part of the
3 problem, is Mr. Mooney signed something thinking he had an
4 agreement. I told Mr. Mooney I'm not going to lie to the
5 Court, because I told him at that time I thought it was wrong,
6 but --

7 THE COURT: Well, in any event, Mr. Mooney, when you
8 came for your plea, you signed the new plea agreement that
9 stated that you could be an armed career criminal and that you
10 could receive a sentence of at least 15 years in prison as a
11 result?

12 THE DEFENDANT: I asked Mr. Frazier at that time,
13 "At any time before sentencing, can I withdraw that plea?"
14 And he assured me yes.

15 THE COURT: Well, I don't know about that, but I've
16 gone back over the questions I asked you at the time of the
17 plea. And in view of the fact that the plea agreement that
18 you signed and that was presented to me and that you
19 acknowledged and accepted the day you were here for your plea
20 told you that you could be an armed career criminal based on
21 your prior convictions -- I asked you specifically about that,
22 if you understood that that was a possibility here and that
23 you would face a mandatory minimum of 15 years if that were
24 the case and that no one could tell what the ultimate
25 guideline range would be or sentence until we did this

1 presentence report, and you indicated at that time you
2 understood and accepted all of those factors.

3 So I cannot find that you -- in this case, I would find
4 that you made a knowing and voluntary decision to enter a
5 guilty plea.

6 The next factor that I've got to look at is whether
7 there's some basis for you to argue that you're legally
8 innocent of this charge.

9 Was there something else you wanted to say about how this
10 happened or why it happened that you believe makes you
11 innocent of illegally possessing a gun this day?

12 THE DEFENDANT: Yes, sir. I took the gun. I took
13 the gun away from somebody to keep them and me from getting
14 hurt, to turn it in to the Huntington police, okay?

15 I did what was right. You know, I didn't do what was
16 wrong. I didn't intentionally do something. I did something
17 that was right. And now I'm being punished to the max for
18 something I did right, and I don't understand it.

19 THE COURT: Well --

20 THE DEFENDANT: I just do not understand it.

21 THE COURT: All right. I'll do the best I can to
22 explain it to you. And I explained the elements of the
23 offense, what the Government would have to prove for you to be
24 convicted at the time that I took your guilty plea. And I'll
25 go over that again.

1 First, obviously the Government has to prove that you had
2 these prior convictions that makes it a crime for you to
3 possess a gun. I explained all that to you. I think you
4 understood all that. And clearly you have the prior felony
5 convictions -- it only takes one -- that makes it illegal for
6 you to possess a gun.

7 Then the only other question is whether you knowingly and
8 intentionally actually possessed the gun that day.

9 Now, I understood at the time of your plea that you may
10 have been, in your mind, doing the right thing because your
11 ex-wife had this gun and apparently was threatening you. And
12 I understand there's a big dispute, or at least there was at
13 the time you were arrested, about whatever argument you might
14 have been having with your ex-wife and whether you were --
15 whether you, more or less, broke in and started causing
16 problems with her or whether it was something where she really
17 was the one who instigated the problem.

18 And none of that really is a factor as far as I'm
19 concerned. And I think the presentence report indicates that
20 we've gotten different versions of what happened at the house,
21 but very clearly even the presentence report and I believe all
22 the law enforcement officers involved in your arrest agree
23 that you took that gun with you and you went to the bar and
24 that at least perhaps you told the bar owner that you'd taken
25 the gun from her and you intended to turn that gun over to the

1 police.

2 THE DEFENDANT: That's correct.

3 THE COURT: Even your ex-wife says that at one point
4 you had said you were -- you didn't like the fact that she had
5 that gun around there and you were taking it and were going to
6 get rid of it.

7 If she was holding a gun on you or threatened you with a
8 gun and you took that gun away from her and threw it in the
9 garbage or something or threw it out in the street or
10 something like that, that might be a defense to this charge.
11 But the fact is, even if you had a good reason to continue
12 possessing that gun, certainly by the time you walked out of
13 the house with it, you committed a crime, if that's factually
14 what happened, if you actually took the gun and left the
15 house. And it appears that no one, even you, argues any other
16 version of it.

17 However the altercation occurred, whether it was you
18 starting it or not, you did leave the house with a gun and you
19 walked down to Whisman's Bar and you walked in there with the
20 gun and you walked out of there with the gun when the police
21 apprehended you.

22 So even though you may have had a good reason to take
23 that gun from her initially, it's pretty clear to me that if
24 those were the facts, that you still violated the law.

25 The statute that Congress wrote here that makes it

1 illegal for you to possess a gun doesn't allow for any
2 circumstances such as a good reason to have the gun. You
3 would be guilty of this crime if you had the gun -- if you had
4 a gun for self-protection. You would be guilty of this crime
5 if you had the gun for hunting or some other legitimate,
6 lawful purpose.

7 So in this case, if it's your argument that you took the
8 gun from her and you walked down to the bar with a good reason
9 behind your having the gun, I don't believe that's a legal
10 defense to this charge. The statute doesn't create any sort
11 of exception for that reason for having a gun. And if you
12 went to trial, I wouldn't let you or your lawyer argue that to
13 the jury.

14 I wouldn't let your lawyer or you argue, "Well, don't
15 convict him on this because even though he possessed the gun
16 and he knew he'd been convicted of a felony and wasn't
17 supposed to possess a gun, that he had a good reason here,
18 because he was really trying to do the right thing and get
19 this gun away from this woman and turn it over to the police."

20 Under the circumstances here, I don't believe that that
21 would be a legal defense to this charge, and I wouldn't let
22 you argue that to the jury, and I believe that you'd still be
23 guilty of the crime.

24 So if that's your real argument here against this plea
25 that you've entered, I don't believe that you have any way of

1 showing me that there's a legal defense that you're legally
2 innocent of this charge. Do you understand all that? I'm not
3 asking if you agree. I just ask if you understand.

4 THE DEFENDANT: (Nods head up and down)

5 THE COURT: You do? I need you to answer out loud.

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Well, I understand why you're unhappy.
8 You know, as I think we discussed at the time of your plea,
9 you've had a number of serious convictions, but it seems like
10 in the last few years you've done a lot better. And as I
11 said, I've never assumed that the first report your ex-wife
12 gave that implied you were breaking in and threatening or
13 something, I never assumed that that was true. It really
14 hasn't mattered, for the reasons I've already explained to
15 you.

16 I think once you walk out of that house with the gun,
17 especially the fact that you continue to possess it, is enough
18 that it would make you guilty of this crime even though you
19 have a pretty good argument for why you took the gun from her
20 in the first place.

21 Is there anything you want to add or say to any of that,
22 Mr. Mooney?

23 THE DEFENDANT: No, sir.

24 THE COURT: Well, before I could let you withdraw
25 your guilty plea, the second factor that I have to consider is

1 whether I think you have an argument that you're legally
2 innocent, and I don't believe that you do.

3 So the first two factors are whether you knowingly and
4 intelligently entered a guilty plea. And I found that you
5 did. And the second factor is whether you have presented an
6 argument for legal innocence. And I don't believe that you
7 have. So I don't even need to go further than the first two
8 factors you can't meet, and therefore I'm not going to allow
9 you to withdraw your guilty plea.

10 In this case, I think the plea was knowingly and
11 intelligently made. And I understand why you're disappointed
12 and frustrated with the result, but I can't find any basis to
13 determine that you're legally innocent.

14 I recognize that you and Mr. Frazier hoped that you might
15 be able to get around this armed career criminal provision if
16 you could knock out that non-aggravated robbery charge that
17 you were convicted of, but under the law it's clear to me that
18 you had three other felonies that fall within the definition
19 of violent felony.

20 A violent felony under this statute doesn't have to be
21 where somebody actually got hurt. It can involve the use or
22 even the threatened use of physical violence. And it doesn't
23 take much to imply a threatened physical violence.

24 Burglary is automatically covered as one of those prior
25 offenses that's deemed to be a violent felony. Robbery by its

1 definition I believe is a violent felony. I haven't looked at
2 any of the indictment that charged you with this
3 non-aggravated robbery that your lawyer objected to. Clearly
4 the aggravated robberies that you were convicted of fall
5 within this category of violent crime.

6 I understand that at the time of your plea, you may not
7 have been completely aware or recall that you had two
8 convictions on the same date for these aggravated robberies,
9 but clearly when you entered your guilty plea -- and I think
10 that was in 1988 --

11 MR. FRAZIER: '89.

12 THE COURT: -- '89, those were two different
13 occasions where you committed aggravated robberies. I think
14 they both involved a threatened use of force. You implied you
15 had a gun or something when you robbed a pharmacy or something
16 like that.

17 So clearly those are -- robbery falls within the category
18 of violent crime. I think non-aggravated robbery does too.
19 Generally speaking, under West Virginia law, even a
20 non-aggravated felony -- or robbery is a felony. So clearly
21 it's a violent felony.

22 Robbery always implies or requires as an element the
23 threat or the use of force. And so by its definition, even
24 non-aggravated robbery I believe falls within the category of
25 violent crime as defined by Section 924 that's at issue here.

1 It can be any violent -- a violent crime could be any felony
2 where the use of force is threatened or where the risk -- I
3 think the statute uses the term "serious risk" or "potential
4 risk" of injury to another person. And I think that even
5 non-aggravated robbery falls within that category.

6 So the long and short of it is, I think in this case you
7 had these prior convictions. You certainly had the
8 opportunity to discuss all this with Mr. Frazier, and he was
9 aware and you were aware that you faced this possibility of
10 armed career criminal.

11 So I think that when you made your guilty plea, you took
12 a chance, took a risk, hoping that you could avoid the armed
13 career criminal. And now that it's clear that you can't, I
14 understand why you would like to get out of this plea, but I
15 don't believe that's a legal reason for me to allow you to get
16 out of the plea.

17 THE DEFENDANT: Give me 165 months?

18 THE COURT: I'm sorry?

19 THE DEFENDANT: Give me 165 months?

20 THE COURT: Well, I wish I could. I intend to give
21 you a sentence at the bottom end, and I would have, probably,
22 had you not been determined to be an armed career criminal and
23 faced a higher amount. But in this case, I think you've got
24 four prior convictions for what are deemed to be violent
25 felonies under the statute that applies here.

1 So having said all that, I will deny the defendant's
2 request that he be allowed to withdraw his guilty plea, for
3 the reasons I've stated on the record.

4 All right. Let's now turn to the sentencing report.
5 Mr. Frazier, you've had a chance to read the report, I'm sure.

6 MR. FRAZIER: Yes, Your Honor.

7 THE COURT: Is there any reason why sentencing
8 should not take place today; now that we've addressed the
9 defendant's desire to withdraw his plea?

10 MR. FRAZIER: No, Your Honor.

11 THE COURT: Mr. Mooney, have you had a chance to
12 read the report and discuss it with your attorney?

13 THE DEFENDANT: Yes.

14 THE COURT: Do you understand the contents of the
15 report?

16 THE DEFENDANT: Well --

17 THE COURT: And I'm not asking if you agree with
18 what the report says or my analysis, but I want to make sure
19 that you've told me about anything in the report that we
20 haven't already discussed now that you believe is improper or
21 would lead to an improper sentence.

22 THE DEFENDANT: Can I ask you something, Judge?

23 THE COURT: Yeah.

24 THE DEFENDANT: How do they go about -- on this
25 point system, you know, there's guys down there in that

1 jail -- is points determined on the person or on the crime or
2 what?

3 THE COURT: Both. Here's the way it works. Yeah,
4 both. Under the law -- Congress passes a law and makes
5 something a crime and sets out what we call a statutory
6 penalty. And that's the minimum or the maximum.

7 In your case, it's a mandatory minimum of 15 years
8 because of all the things we've just talked about. Under the
9 statute, you have three prior violent felony convictions. And
10 so when you possessed this gun, you're subject to this armed
11 career criminal provision that makes a mandatory minimum of
12 15 years.

13 Within the penalties set out by Congress, that 15 to
14 life, the Court has to look at the sentencing guidelines. And
15 that assigns points to, first, the circumstances of the crime
16 and, secondly, to things like your criminal history, things
17 that are directly determined by who you are and what you've
18 done in your past.

19 In a drug case, the sentence is largely determined by the
20 amount of drugs. Under the guidelines, the more drugs you've
21 got, the more points you've got. Under other gun charges,
22 for instance, the more guns you've got, the more points you
23 get.

24 If you've just been in possession of a gun, you get so
25 many points. If you actually use that gun, you might get more

1 points for that.

2 So all of those things determine points. We use points
3 for all of that so that we try to treat people pretty much the
4 same. If there are two people in here who have been convicted
5 of drugs, one of them had a lot more drugs than the other, the
6 one with a lot of drugs is going to have more points and get a
7 higher sentence. If they have the same number of drugs,
8 they're going to get the same number of points. So it makes
9 it much more uniform as a result.

10 The same on your criminal history. There are points that
11 get applied, depending on what you've been convicted of,
12 whether it was a serious crime or not, what kind of sentence
13 you got before, how long ago it was. If you commit a crime
14 while you're on probation, you get more points on your
15 criminal history for that.

16 So all of those things result in points, and that's what
17 these guidelines use, is a point system. We add up all the
18 points. When you enter a guilty plea or you play a smaller
19 role in the offense as compared to other people, you get
20 points taken off.

21 As you already understand, in your case you would
22 normally get three points taken off because you have been
23 cooperative and truthful and entered a guilty plea.
24 Unfortunately for you, that statutory sentence, the one that
25 Congress passed here, sets a floor of 15 years. So it doesn't

1 matter what your points are, you're going to get at least 15
2 years. And you could get higher if you have points that put
3 you up over 15 years. It could be up to life.

4 So, in short summary, that's the way these points work
5 and that's the way it will work in your case. Do you
6 understand?

7 THE DEFENDANT: Thanks for the information.

8 THE COURT: All right. Given all that, do you
9 believe you understand the contents of the report?

10 THE DEFENDANT: Yes.

11 THE COURT: All right. All right. I've reviewed
12 the addendum. It appears that there were two objections.

13 First, as I understand it, the defendant objects to
14 language in different paragraphs of the report that describe
15 the offense conduct.

16 I note, as the probation officer pointed out, that there
17 were different versions of what happened between you and your
18 ex-wife and that those different versions came, first, from
19 her, that she gave slightly different versions, first, when
20 she made the call to 911 and, second, when she talked to law
21 enforcement officers. She's made different versions when she
22 talked to probation.

23 Because of all that, I would find in this case that the
24 probation officer accurately and properly noted in the report
25 which statement your ex-wife made, and when, because it's

1 clear from the report that she made different -- she gave
2 different versions of what happened.

3 All the probation officer is trying to do here is report
4 those different versions. And it's clear that she's -- the
5 probation officer is clear that she's talking about the
6 different things that your ex-wife said and not taking sides
7 on whether she was telling the truth on all these occasions or
8 which version is right.

9 As I've indicated in discussing your request that you be
10 allowed to withdraw your plea, I think I said -- and I'll say
11 it again, to be more blunt about it -- I don't know exactly
12 what happened there between you and your ex-wife. I think
13 you're just as credible, or maybe more so, than she is about
14 what happened between the two of you that resulted in this gun
15 coming out and being in your possession. But it doesn't
16 matter.

17 Whether you broke in her house and you threatened her or
18 whether, you know, she did everything wrong and bad and she
19 was the one who instigated this entirely doesn't matter under
20 these guidelines. You're not being sentenced more harshly
21 because I think you started the problem in the house. It has
22 nothing to do with that.

23 THE DEFENDANT: I understand.

24 THE COURT: So given that, Mr. Frazier, unless you
25 can tell me something to the contrary, I don't believe I need

1 to resolve exactly what happened and whose version is the
2 truth, the truthful version of what happened with his ex-wife
3 at the house that resulted in his possessing the gun.

4 MR. FRAZIER: You're correct, Your Honor.

5 THE COURT: All right. Then the other objection
6 goes to his criminal history and the convictions.

7 As the probation officer noted in this case, he has four
8 prior felony convictions. You objected that the
9 non-aggravated robbery shouldn't be included as a predicate
10 offense for this armed career criminal.

11 If it's not, the Court would find that he still has the
12 other three convictions that we've already discussed. Three
13 is all it takes. So even if I find that the non-aggravated
14 robbery should not count as a predicate offense, he's still
15 stuck with the other three. Is that right?

16 MR. FRAZIER: I think that's correct.

17 THE COURT: All right. For clarification reasons,
18 do you want to make any further argument about whether the
19 non-aggravated robbery should or shouldn't count?

20 MR. FRAZIER: I think I set out my argument in my
21 objections and I don't see any reason to belabor any more time
22 on it, Your Honor. And as you say, even if I'm right, it
23 doesn't affect the sentence.

24 THE COURT: Mr. Bushong, do you want to address that
25 at all?

1 MR. BUSHONG: No, Your Honor. I agree.

2 THE COURT: All right. Well, the Court finds in
3 this case that it's unnecessary for me to resolve whether the
4 non-aggravated robbery should count, because he's got the
5 other three convictions, and clearly those are predicate
6 offenses for the armed career criminal provisions.

7 Are there any other objections the Court need address in
8 this case?

9 MR. FRAZIER: No, sir.

10 THE COURT: All right. The Court finds sufficient
11 indicia of reliability to support the probable accuracy of the
12 information in the presentence report and the addendum.
13 Accordingly, the Court adopts the presentence report and the
14 addendum.

15 If an appeal is taken, the Court orders the probation
16 office to submit a copy of the final presentence report to the
17 clerk for filing under seal to transmit to the Court of
18 Appeals under seal. In the event of an appeal, the probation
19 office, upon request from appellate counsel and without
20 further order of this Court, shall provide counsel with a copy
21 of the final presentence report, except for the recommendation
22 section.

23 At this time the Court accepts the plea agreement on the
24 grounds that the defendant's plea adequately reflects the
25 seriousness of the actual offense behavior and accepting the

1 agreement will not undermine the statutory purposes of
2 sentencing or the sentencing guidelines. The Court's judgment
3 and sentence will be consistent with the plea agreement.

4 The defendant stands convicted of possession of a firearm
5 by a convicted felon in violation of 922(g)(1) and 924(a)(2).
6 The maximum penalty for this violation is imprisonment of --
7 excuse me. He also qualifies as an armed career offender
8 under Section 924(e). The maximum penalty for this violation
9 as enhanced by 924(e) is imprisonment of not less than 15
10 years, up to life, supervised release of not more than five
11 years, a fine of \$250,000, restitution, and the special
12 assessment.

13 The relevant sentencing guideline is found in Section
14 2K2.1. It would set a base offense level of 24 because the
15 defendant has at least two prior felony convictions. However,
16 4B1.4 provides that the offense level for an armed career
17 criminal is determined by 924(e), the enhanced sentence.
18 Under the -- as a result of the prior convictions the Court
19 has already discussed, the defendant is an armed career
20 criminal under the statute. And because of that, he faces an
21 offense level of 33, that being the higher level applied by
22 the career offender guidelines.

23 The defendant is entitled to the reduction for acceptance
24 of responsibility. The Court finds in this case he's entitled
25 to the full three-level reduction. That would set a base

1 offense -- total offense level, rather, of 30.

2 He has 13 criminal history points. That puts him in
3 category VI. But because he's an armed career criminal, the
4 Court notes that the term of imprisonment would be not less
5 than 180 months because it's a mandatory minimum of 15 years.
6 So even though he has a total offense level of 30 and a
7 criminal history category of VI, the guideline range would be
8 180 months to 210 months, supervised release of three to five
9 years, a fine of \$15,000 to \$150,000, restitution, and the
10 special assessment.

11 Mr. Bushong, do you want to comment on my calculations or
12 otherwise address the Court?

13 MR. BUSHONG: Could I have one second, Your Honor?

14 (Mr. Bushong and Mr. Frazier conferred privately off the
15 record.)

16 MR. BUSHONG: Your Honor, I believe your
17 calculations are correct, and nothing further to add.

18 THE COURT: All right. Mr. Frazier?

19 MR. FRAZIER: Your Honor, first, I'd like to, if I
20 can, make the voided plea agreement maybe an exhibit to this,
21 just so --

22 THE COURT: All right. You may file it.

23 MR. FRAZIER: It's been signed by Mr. Mooney and
24 myself, but not by the Government. I tender that and make it
25 part of the record.

1 THE COURT: All right.

2 MR. FRAZIER: The cross here on the front is my
3 writing.

4 Your Honor, I think you understand the situation here. I
5 won't take much of your time. I would ask that you sentence
6 Mr. Mooney near the low end.

7 He's got a checkered past. There's no question. But if
8 you look at it, it's all drug- and alcohol-related. You know,
9 he wasn't a very nice man for a long, long time, but the last
10 few years he has straightened things out and he was making
11 good wages and paying his taxes.

12 Unfortunately, he got himself in this situation here
13 which you understand -- we understand -- we all understand
14 it's unfortunate, but the law is what the law is. I would ask
15 that you sentence him near the lower end.

16 He does have hepatitis and medical problems. And we
17 would ask that when it comes time to -- if you could recommend
18 he be sentenced to a facility that would allow him to get
19 treatment for that.

20 THE COURT: All right. Mr. Mooney, do you want to
21 say anything before I impose sentence?

22 THE DEFENDANT: Well, Your Honor, I've tried to do
23 what was right. I mean, this is a big mistake, and I don't
24 understand the biggest part of it, but I guess it's not up to
25 me. I tried to do what is right. I've worked out of the

1 union for the last five years. I tried to be a working man of
2 society, you know. Like you said, unfortunately this
3 happened. I mean, you know, that's about all I can say, Your
4 Honor.

5 THE COURT: All right. Well, as I've already
6 indicated, Mr. Mooney, I understand why you feel that this is
7 unfair. On a personal level, I think it's probably an example
8 of why mandatory minimum sentences, especially such high ones
9 like 15-year floors, are unfair, because if I had my
10 preference, I think that the sentence you would get under the
11 guidelines would be a fairer sentence and that this -- I
12 certainly would give you a sentence at the bottom end of the
13 guideline range. I wouldn't sentence you as high as I'm going
14 to because of the mandatory minimum.

15 So I think it's unfair to that extent, but I don't have
16 any choice but to follow the statute that Congress has passed
17 and directed in this case.

18 So it will be the judgment of this Court that the
19 defendant be committed to the custody of the Bureau of Prisons
20 for a term of 180 months.

21 I do recognize you have serious health problems. As a
22 result, I'm going to recommend that the Bureau of Prisons
23 designate a medical center where you can be fully evaluated
24 for all your medical problems.

25 Upon release from prison, the defendant will be on

1 supervised release for three years. Within 72 hours of
2 release from custody, the defendant will report in person to
3 the probation office in the district to which he's released.

4 Mr. Mooney, when you go on supervised release, you must
5 not commit another federal, state or local crime. You must
6 not possess a firearm or other dangerous device. And you must
7 not unlawfully possess a controlled substance.

8 You will be required to comply with the standard terms
9 and conditions of supervised release as recommended by the
10 sentencing commission and as adopted by this Court, including
11 the special condition that you participate in a program of
12 testing, counseling and treatment for drug and alcohol abuse
13 as directed by your probation officer.

14 The Court does not find that this defendant poses a low
15 risk of future substance abuse. Accordingly, the Court orders
16 the defendant to submit to one drug test within 15 days of
17 release and at least two periodic drug tests thereafter as a
18 condition of supervised release.

19 The Court finds the defendant doesn't have the resources
20 to pay a fine. And given his medical condition, it's unlikely
21 he'll be able to pay a fine in the future. Accordingly, the
22 Court imposes no fine.

23 There's no identifiable victim, and the Court does not
24 order the defendant to pay a fine. Accordingly, the Court
25 does not order the defendant to pay restitution.

1 The Court does order the defendant to pay the \$100
2 special assessment. And I understand he's agreed to pay that
3 by participating in the Inmate Financial Responsibility
4 Program.

5 The Court finds, with the exception of the fine, this
6 sentence is within the guideline range. In this case, the
7 guideline range would exceed 24 months, and because the
8 mandatory minimum was 180 months, the Court imposed a sentence
9 at the bottom end of the guideline range. I believe that that
10 is a fair sentence given the circumstances of your arrest and
11 conviction.

12 The Court finds that that sentence reflects the nature
13 and circumstances of the offense, the history and
14 characteristics of the defendant, and the needs for
15 deterrence.

16 Are there any reasons why this sentence should not be
17 imposed as stated?

18 MR. BUSHONG: No, Your Honor.

19 MR. FRAZIER: No, sir.

20 THE COURT: If not, I order the sentence imposed as
21 stated.

22 Mr. Mooney, you have a right to appeal this sentence. If
23 you choose to appeal, you have to file a written notice of
24 appeal with the Clerk of this Court within ten days of
25 judgment being entered in your case. If you fail to file that

1 written notice of intent to appeal within this ten-day period,
2 you may lose your right to appeal. Do you understand that?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Also, if you file that notice of appeal
5 and the Court finds you don't have the money to hire a lawyer
6 or to get documents or transcripts you would need for an
7 appeal, those costs will be borne by the United States. Do
8 you understand that?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: All right. Are there any other matters
11 the Court need address in his case?

12 MR. BUSHONG: No, Your Honor.

13 MR. FRAZIER: No, sir.

14 THE COURT: If not, we'll stand in recess.

15 (Hearing concluded at 11:45 a.m.)
16
17
18
19
20

21 I, Teresa M. Ruffner, certify that the foregoing is a
22 correct transcript from the record of proceedings in the
23 above-entitled matter.

24 Teresa M. Ruffner June 24, 2003
25

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-4433

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

JOHN DAVID MOONEY,

Defendant - Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington. Robert C. Chambers, District Judge. (CR-02-231)

Submitted: October 22, 2003

Decided: March 22, 2004

Before WILKINSON, NIEMEYER, and LUTTIG, Circuit Judges.

Affirmed by unpublished per curiam opinion.

W. Michael Frazier, FRAZIER & OXLEY, L.C., Huntington, West Virginia, for Appellant. Kasey Warner, United States Attorney, Miller A. Bushong III, Assistant United States Attorney, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

John David Mooney pled guilty to possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g), 924(a)(2) (2000). On appeal, he alleges that the district court erred by denying his motion to withdraw his guilty plea. We do not find that the district court abused its discretion in denying Mooney's motion to withdraw. United States v. Ubakanma, 215 F.3d 421, 424 (4th Cir. 2000). Thus, we affirm. We also deny Mooney's motion to stay case. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED